Public Finance Bhd v Mohamad Adnan bin Mamat Nor

HIGH COURT (KUALA TERENGGANU) — CIVIL APPEAL NO 11-09-98 OF 1999
ABDUL KADIR SULAIMAN J
4 MAY 1999

Civil Procedure *— Affidavits — Service — Application to set aside default judgment — Whether applicant required to give notice to respondent of intention to use affidavit in support of application — Whether affidavit in support of application to be filed within 14 days of such application*

The plaintiff filed suit for the recovery of RM22,000 with interest and costs. The defendant disputed the claim and the court allowed time for the defendant to file a statement of defence. On the return date, the statement of defence was not filed and the defendant failed to appear. The court allowed judgment in default to be entered against the defendant. The defendant filed an application to set aside the judgment in default and an affidavit in support thereof. The plaintiff raised a preliminary objection on the admissibility of the said affidavit. The objection was grounded on the defendant's failure to give any notice to the plaintiff of its intention to use the said affidavit and on the defendant's failure to serve the same within 14 days of the filing. The magistrate dismissed the preliminary objection and allowed the defendant's application. The plaintiff appealed.

Held, dismissing the appeal:

(1) All that the defendant was required to do was to give notice of his filing of the said affidavit in support which the defendant had done. Service of the said affidavit constituted notice given for the purpose of O 24 r 4(1)(a) of the Subordinate Courts Rules 1980. Once the affidavit was served, the defendant was no longer obliged to give notice to the plaintiff that he intended to use the said affidavit. The defendant would only be required to give such notice if he intended to use in the proceedings any other affidavit he had filed in any other previous proceedings (see p 603B–D);

(2) In an application to set aside a judgment in default the 14-day period governing the filing and service of the affidavit in support of the application is inoperative (see p 604B–D).

[Bahasa Malysia summary

Plaintif telah memfailkan guaman untuk mendapatkan kembali RM22,000 dengan faedah dan kos. Defendan mempertikaikan tuntutan tersebut dan mahkamah memberikan masa untuk defendan memfailkan satu pernyataan pembelaan. Pada tarikh kembalian, pernyataan pembelaan telah tidak difailkan dan defendan gagal hadir. Mahkamah membenarkan penghakiman ingkar dimasukkan terhadap defendan. Defendan telah memfailkan satu permohonan untuk

mengenepikan penghakiman ingkar dan satu afidavit sokongan baginya. Plaintif telah membangkitkan bantahan awal mengenai keboleh-terimaan afidavit tersebut. Bantahan tersebut adalah berasaskan kegagalan defendan untuk memberikan sebarang notis kepada plaintif mengenai niatnya untuk menggunakan afidavit tersebut dan atas kegagalan defendan untuk menyampaikannya dalam tempoh 14 hari daripada pemfailan tersebut. Majistret telah menolak bantahan awal tersebut dan membenarkan permohonan defendan. Plaintif merayu.

Diputuskan, menolak rayuan tersebut:

(1) Apa yang perlu dilakukan oleh defendan adalah untuk memberikan notis mengenai pemfailan afidavit sokongan tersebut yang telah pun dilakukan oleh defendan. Penyampaian afidavit tersebut membentuk notis yang diberikan bagi tujuan A 24 k 4(1)(a) Akta Mahkamah Rendah 1980. Sebaik sahaja Afidavit disampaikan, defendan tidak lagi berkewajipan untuk memberi notis kepada plaintif bahawa beliau berniat untuk menggunakan afidavit tersebut. Defendan akan hanya diperlukan memberi notis yang sedemikian jika berniat untuk menggunakan dalam prosiding tersebut mana-mana afidavit lain yang telah beliau failkan dalam mana-mana prosiding dahulu yang lain (lihat ms 603B–D).

(2) Dalam sesuatu permohonan untuk mengenepikan penghakiman ingkar tempoh selama 14-hari yang menguasai pemfailan dan penyampaian afidavit sokongan permohonan tersebut tidak beroperasi. (lihat ms 604B–D).]

Notes

For cases on service of affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 287–288.

Legislation referred to

Subordinate Courts Rules 1980, O 24 r 4(1)(a), r 4(2)(a), O 28 r 8, O 29 r 14

Ahmad Kamil bin Noh (*Lin & Associates*) for the appellant.
Ab Aziz bin Ab Rahman (*Ab Aziz & Rakan-Rakan*) for the respondent.

Abdul Kadir Sulaiman J: In the Magistrate's Court, Kemaman, the appellant, a finance company, issued a summons against the respondent claiming a sum of RM22,000 with interest at 8% per anum from 4 June 1991 until realisation and costs arising out of the purchase of a stolen motorcar by the appellant from the respondent for the purpose of its business of hire purchase.

The respondent disputed the claim and the court allowed time for the respondent to file its statement of defence and fixed a date after the said period for the parties to appear. On the return date the respondent failed to turn up and by that date also it had failed to file its defence as directed. The appellant, however, appeared. Upon the application of the appellant, the court by its order of 21 April 1998 entered default judgment against the respondent for its failure to file its defence and also for failure to attend.

The respondent aggrieved with the said decision, on 25 May 1998 filed an application with a supporting affidavit under O 28 r 8 of the Subordinate Courts Rules 1980 (hereinafter referred to as 'the SCR 1980') to set aside the said default judgment. However, the said affidavit was only served on the appellant on 10 June 1998 which is 16 days after the filing of it in court. Before the learned magistrate and before me, the learned counsel for the appellant raised a preliminary objection on the admissibility of such affidavit being in breach of O 24 r 4(1)(a) of the SCR 1980 for failure to give any notice to the appellant of its intention to use the said affidavit, and also in breach of O 24 r 4(2)(a) of the SCR 1980 for failure to serve the same on it within 14 days from the date of the filing of the application. In the circumstances, the appellant urged upon the court to ignore the said affidavit in support. However, the learned magistrate rejected the said preliminary objection of the appellant and proceeded to hear the application of the respondent on merits. On the evidence before the learned magistrate he allowed the application of the respondent and set aside his default judgment of 21 April 1998. Hence this appeal to the judge in chambers against the said decision.

Order 24 of the SCR 1980 states as follows:

> 4 (1) Any party —
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> (a) filing an affidavit intended to be used by him in any proceedings in Chambers; or
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> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,
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> must give notice to every other party of the filing or, as the case may be, of his intention to do so.
>
> (2) Except as otherwise provided by these rules —
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
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> (b) a party intending to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

On the issue of the breach of O 24 r 4(1)(a) of the SCR 1980 for the failure on the part of the respondent to give notice to the appellant of its intention to use the said affidavit in support, it was submitted before me by the learned counsel for the appellant that the respondent did not give any notice to it of the intention to use the said affidavit in support of its application to set aside the default judgment. With respect, I think the learned counsel has misconstrued the provisions of O 24 r 4(1)(a) of the SCR 1980. There are

two limbs to the said r 4(1). The first concerns the affidavit intended to be used in the present proceedings in chambers, and the second concerns the use in the present proceedings in chambers of an affidavit filed in previous proceedings. As regards the first, the rule merely requires that notice of such filing be given to the other party. As to the second, since the affidavit had been filed in the previous proceedings, the notice of the intention to use it in the present proceedings need be given. Applying the fact of this case to the matter before the learned magistrate and before me now in this appeal, it is erroneous on the part of the learned counsel to require the respondent to give notice of its intention to use the said affidavit in support in the proceedings to set aside the default judgment. All that is necessary for the respondent to do is to give notice to the respondent of the filing of the said affidavit in support, the requirement of O 24 r 4(1)(a) of the SCR 1980 which the respondent had fully complied with by having the said affidavit in support served on the respondent on 25 May 1998. Service of the said affidavit upon the appellant in this case is a notice given for the purpose of O 24 r 4(1)(a) of the SCR 1980. Hence, the respondent in this case has complied with the requirement of the rule. The respondent is no longer obliged to give notice to the appellant that it intends to use the said affidavit in support in the proceedings then before the learned magistrate. The respondent is required to give such a notice only if it intends to use in the proceedings any other affidavit which it has filed in any other previous proceedings, which is not the case here. This is clear from the use of the phrase 'as the case may be' in the condition requiring the giving of notice in the said r 4 which governs the position either of sub-r (a) or (b) thereof.

On the issue of the breach of O 24 r 4(2)(a) of the SCR 1980 in that the said affidavit in support of the respondent's application was not served on the appellant within 14 days from the date of the filing of the application, it is not in dispute that the application of the respondent was filed on 25 May 1998 and was served on the appellant on 10 June 1998. The point to consider here is whether in the circumstances of the application of the respondent, the said r 4(2)(a) applies thereby rendering the said affidavit in support inadmissible. Much has been said in previous cases before the courts as to the purpose behind legislating this r 4(2) of O 24 which provisions are in pari materia with O 32 r 13(2) of the Rules of the High Court 1980. I need not repeat here. The operative words in the said rule are 'Save as otherwise provided in these rules'. It means that this rule is operative only in the absence of any express provisions to the contrary in the SCR 1980. If there is any such express provisions governing a particular matter in the SCR 1980, this r 4(2) of O 24 will not apply to the matter. This application of the respondent was made pursuant to O 28 r 8 of the SCR 1980 which states:

> 8 (1) Any judgment or order obtained where one party does not appear at the hearing my be set aside by the Court, on the application of that party, on such terms as it thinks just.
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> (2) An application under this rule shall be subject to O 29 r 14.

Hence, the procedure for making such an application is as laid down in O 29 r 14 of the SCR 1980. The Order states:

> 14 Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

It goes without saying that such an application must be supported by an affidavit evidence. This application of the respondent to have the default judgment set aside is without doubt an application allowed to be made by O 28 r 8 which must abide by the procedure laid down in O 29 r 14 of the SCR 1980. It is without doubt also that in such an application, the evidence in support must come from an affidavit in support affirmed by the applicant. In the circumstances, this O 28 r 8 read with O 29 r 14 is an express provision thereby taking away the operation of O 24 r 4(2)(a) of the SCR 1980 against the respondent. Hence the 14 day rule governing the filing and the serving of the affidavit in support of the application in the said O 24 r 4(2)(a) is not applicable to the respondent.

For the above reasons, the preliminary objection of the appellant concerning the affidavit in support of the respondent lacks any substance and the learned magistrate was correct in disallowing the said preliminary objection and proceeding to hear the merits of the application. I, therefore, overrule the said preliminary objection and would now proceed to hear the merit of this appeal of the appellant to the judge in chambers.

Appeal dismissed.

Reported by Andrew Christopher Simon